Supreme Court, U.S.
FILED

No. 10-787 DEC 9 - 2010

OFFICE OF THE CLERK
In The William K. Suter, Clerk

SUPREME COURT of the UNITED STATES

MARGARET KLEINMAN,

Petitioner

v

NEW JERSEY DEPARTMENT OF LABOR ("NJDOL"), DIVISION OF UNEMPLOYMENT AND WORKFORCE DEVELOPMENT,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

MARGARET KLEINMAN
318 Anderson St.
Hackensack, N.J. 07601
(201) 342-7738
Attorney Pro Se for Petitioner

QUESTIONS PRESENTED

I WHERE THERE WAS NO REQUISITE NOTICE OR HEARING, IS NEW JERSEY'S INTERPRETATION OF DUE PROCESS, HOLDING THAT THE STATUTE AND CODE PROVIDED NOTICE AND OPPORTUNITY TO BE HEARD AND FOR THE FIRST TIME SHIFTING THE BURDEN OF NOTICE TO THE CLAIMANT, CONSTITUTIONAL?

II WHERE THERE IS NO NOTICE STATUTE; CODE'S NOTICE PROVISION IS OBSCURE, AND THE NJDOL, CONTRARY TO ITS JURISDICTION OVER REVIEW, MISINFORMS CLAIMANTS THAT THERE IS NO RIGHT TO APPEAL, DO THE PROCEDURAL SAFEGUARDS MEET CONSTITUTIONAL REQUIREMENTS?

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BASIS FOR JURISDICTION

The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1257, which states in pertinent part:

> (a) Final judgments or decrees rendered by the highest Court in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari where the validity . . . of any statute of any state is drawn in question on the ground of its being repugnant to the Constitution . . .

The case involves procedural due process under the United States Constitution, Amendment XIV, Section 1, which states:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law

New Jersey's administrative code, N.J.A.C. 12:18-2.2(f), Petition, p. 4, provides that a denial of temporary disability benefits must include notice of appeal rights. Petitioner, an injured worker, was denied benefits but did not receive the requisite notice, and when she sought to appeal, the NJDOL misinformed her that there was no right to appeal and did not provide procedures, causing a loss of benefits. The trial court found that the statute and code would have provided notice and opportunity to be heard had Petitioner chosen to make use of them.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment XIV, Section 1:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law

N.J.S.A. 43:21-50. Review

(a) If a person claiming benefits under an approved private plan shall be unable to agree with the employer or insurer as to benefits thereunder, such claimant may, within one year after the beginning of the period for which benefits are claimed, file a complaint with the division, which shall conduct such investigation, including informal hearings, as it deems proper. Such complaint shall be filed in writing in a form satisfactory to the division. The division shall have the authority to make procedural rules and regulations providing for a fair and impartial hearing, and shall designate one or more hearing officers. If the issues raised by the complaint are not settled, the hearing officer shall conduct a hearing upon due notice to the claimant, the employer and the insurer, if any, at which any party in interest shall have the right to appear. At such hearing evidence, exclusive of ex parte affidavits, may be produced by any party, but

the hearing officer, in conducting the hearing, shall not be bound by the rules of evidence. All proceedings at such hearing shall be recorded, but need not be transcribed unless the order on the disputed claim is to be reviewed. The hearing officer shall make a determination of facts, and an order disposing of the issues presented, which shall be final and binding on the claimant, the employer and the insurer. A copy of such order shall be served upon each of the interested parties by registered mail addressed to their respective last known addresses. Any party in interest feeling aggrieved by action of the hearing officer may secure judicial review through a proceeding in lieu of prerogative writ. The cost of recording and transcribing the proceedings, and of the preparation of the entire record required on the review, shall constitute a cost of administering this act.[1]

(b) Individuals claiming benefits under the State plan shall be entitled to review hearing and determination as provided in unemployment compensation cases.

L.1948, c.110, p.607, §.26. Amended by L.1953, c.41,, §..11. eff. March 19, 1953.

[References are only to the State plan and are omitted.]

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[1] N.J.S.A. 43:21-25 et. seq.

N.J.A.C. 12:18-2.2. Benefits

(a) An employee shall not be entitled to any benefits from the Fund with respect to any period of disability commencing while he or she is covered under a private plan.

(b) An employee shall not be paid any benefits for disability during unemployment (N.J.SA 34:21-3.4) for any period of disability commencing while he or she is a "covered individual" as defined in unemployment N.J.SA 43::21-27(b).

(c) The benefits provided by a private plan shall be set forth in the plan both as to eligibility requirements and amounts payable.

(d) If application for benefits is made under the State plan or Disability During Unemployment and it is determined that the claim should have been made under a private plan, an employee shall not be deprived of benefits under the private plan for failure to give timely notice and proof of disability provided that:

1. The application to the State plan would have been timely notice to the private plan if it had been then made; and

2. Proof of disability is furnished under such private plan within the period required therein or within 30 days after the employee has notice that the claim should have been made thereunder.

(e) If an employee is paid benefits under a private plan, the amount of such benefits shall not be deducted from the amount of benefits to which he or she may be entitled under the State plan, or under N.J.SA 43:21-3 and N.J.S.A 43:21-4 as an unemployed claimant, for a subsequent period of disability. If an employee is paid benefits under the State plan, the amount of such benefits shall not be deducted from the amount of benefits to which he or she may be entitled under a private plan, or under N.J.SA 43::21-3 and N.J.S.A 43:21-4 as an unemployed claimant, for a subsequent period of disability.

(f) If the benefits claimed by an employee or his or her authorized representative under a private plan are denied, such denial shall be by written notice to the employee or his or her authorized representative, giving the reason therefore and stating the employee's appeal rights as provided under N.J.A.C. 12:18-2.6 and N.J.A.C. 1:12:A. Upon the issuance of such notice, the Division shall be immediately furnished with a copy of the claim and the notice of denial, or facsimiles thereof.

(g) The private plan shall provide for payment of benefits to employees weekly, biweekly, or at such intervals as the employee is customarily paid wages, unless otherwise approved by the Director.

(h) No reduction in the amount or duration of benefits or increase in the rate of employee contributions shall be made without prior approval of the Division. Approval shall be given if the Division finds that the plan, after such modification, continues to meet the requirements of the Act and this chapter and, if the employees are to contribute toward the cost of such modified plan, that a majority of the employees covered by the plan have agreed to the modification by written election (by ballot or otherwise) in accordance with this chapter.

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1. The Division shall be given prompt notice of any change to a private plan, which change does not affect nor alter the provisions of the plan, and, therefore, does not require approval under this section

N.J.A.C. 12:18-2.6 Appeals

(a) The appeal procedures for private plan temporary disability cases are found at N.J.A.C. 1:12A and are appendixed at the end of this chapter,

(b) If an employee covered under a private plan is denied benefits by the insurer for any period of disability or he or she disagrees with a determination of benefits made by the insurer, he or she has the right to appeal the determination or denial.

(c) The appeal or complaint shall be filed with

the Division within one year after the beginning of the period for which benefits are claimed. Such appeal or complaint shall be filed, either personally or by mail, by the employee or his or her representative. A later appeal shall be considered on its merits if it is determined that the appeal was delayed for good cause. Good cause exists in circumstances were it is shown that:

1. The delay in filing the appeal was due to circumstances beyond the control of the appellant; or

2. The appellant delayed filing the appeal for circumstances which could not have been reasonably foreseen or prevented.

(d) Any appeal or complaint by an employee claiming benefits under an approved private plan shall be filed on a form and in a manner prescribed by the Director. The employee must include the reasons for the appeal or complaint and explain why he or she disagrees with the denial of benefits on the form.

(e) Upon receipt of such appeal or complaint, the Division shall conduct an investigation and such informal conferences as it may deem necessary to determine the facts and settle the issues.

(f) Any appeal or complaint shall be deemed filed on the day it is delivered to the office of the Division of Temporary Disability Insurance,

> Labor Building, PO Box 957, John Fitch Plaza, Trenton, New Jersey 08625-0957, or if mailed, the complaint shall be deemed filed on the postmarked date appearing on the envelope in which the complaint is mailed; provided postage is prepaid and the envelope is properly addressed.

STATEMENT OF THE CASE

The applicable notice provision, N.J.A.C. 12:18-2.2 (f), p. 5, stating that written notice of denial of private disability must state appeal rights was not found by the parties until Petitioner discovered it while petitioning the New Jersey Supreme Court. It is inconspicuously located toward the end of the code provision titled "Benefits," that is separate from the section on appeal procedures N.J.A.C. 12:18-2.6, at p. 6.

New Jersey allows injured workers to receive "immediate" payment of Temporary Disability Benefits pending resolution of a workers' compensation claim to compensate them for lost income and help tide them over during the inability to work, *In re Scott*, 321 N.J. Super. 60, 64. (1999); *Sperling v. Board of Review*, 156 N.J. 466. (N.J. 1998) citing *Janovsky v. American Motorists Ins. Co.*, 11 N.J. 1,5 (1952.) New Jersey provides that the same laws, regulations and practices applicable to Unemployment Compensation, 43:21-1 *et. seq.*, apply to the administration of disability to the extent [they] are not inconsistent ... N.J.S.A. 43:21-42 n.1.

Petitioner, an injured worker whose workers' compensation was cut off, applied for temporary disability benefits with the NJDOL, which processed her claim In a follow-up letter, the NJDOL wrote, "Our file will be kept open until we are notified of the ... decision." The employer sent Petitioner a denial of benefits that did not contain notice of appeal rights, with a copy to the NJDOL.

Seeking to appeal, Petitioner asked the NJDOL how to proceed and was told nothing could be done because there was no right to appeal under private plans, which later proved erroneous. Petitioner was deprived of benefits and lost her assets. She complained about her losses to worker's compensation and other attorneys but was not told of the appeal or of any claim against the NJDOL.

Petitioner discussed the loss with the employer and another attorney, who first informed her that what the NJDOL told her was incorrect. Petitioner filed a negligence suit against the NJDOL, alleging that it failed to inform her of her right to appeal or provide her with procedures, causing deprivation of benefits and loss of assets.

She argued that where the NJDOL could have corrected the notice failure, instead it allowed the employer to prevail, without providing an opportunity to be heard. Respondent defended on exhaustion of remedies and Statute of Limitations. Petitioner argued that exhaustion was inapplicable under the equitable principle that preventing a party from filing defeats repose and that Respondent was estopped from invoking the Statute of Limitations

where it induced her not to file.

The trial court held that procedures the State had in place "would have provided due process had plaintiff chosen to make use of them," p. 7a, 15a.

> . . . plaintiff is not challenging the procedures the state had in place *which would have provided due process had the plaintiff chosen to make use of them.* Rather, plaintiff's argument she was not advised of these procedures. This argument is without merit. Plaintiff's ignorance of these procedures and ultimate failure to initiate the appeals process cannot constitute a due process violation where the State provided her with an opportunity to be heard. That's *Poritz* at page 106.
>
> . . . plaintiff had an administrative remedy available to her to appeal the denial of benefits she claims in this complaint. Citing to New Jersey Administrative Code 12:18-26 which outlines the process to appeal denials of temporary disability under private plans. Therefore, *given the existence of these procedures*, plaintiff must exhaust these remedies before filing a lawsuit and the matter must be dismissed.

REASONS FOR GRANTING THE WRIT

I. THE COURT MISINTERPRETS DUE PROCESS LAW BY HOLDING THAT WHERE THERE WAS NO NOTICE OR HEARING, THE STATUTE AND CODE PROVIDED NOTICE AND OPPORTUNITY TO BE HEARD, AND FOR THE FIRST TIME SHIFTING THE BURDEN OF NOTICE TO THE CLAIMANT

In *Mullane, Special Guardian v. Central Hanover Bank & Trust Co., Trustee et. al.*, 339 U.S. 301, 314, 315 (1950), this Court construed notice as a method of communication, apart from the statute. "When notice is due, process which is a mere gesture is not due process ... The reasonableness and constitutional validity of *any chosen method* may be defended on the ground that it is ... reasonably certain to inform those affected. " The Court stated that prior to an action that will affect life, liberty or property protected by Due Process, "a State must provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." The Court found published notice insufficient, saying there were "more effective means such as personal service or mailed notice."

The decision below misinterprets and rewrites Due Process law by holding that statutes and codes provide notice and opportunity to be heard. It conflicts with *Mullane* and other cases showing that the statutes' purpose is to provide the information that notices should contain, In *Wilson v. Quadramed,* 225 F.3d 350 (CA3 1999), the Court of Appeals for the Third Circuit found that a party

was properly notified because the notice satisfied the requirements of the Fair Debt Collection Act.

Relying on the New Jersey Supreme Court labor case of *Rivera v. Board of Review*, 127 N.J. 578 (1992), New Jersey's Appellate Division also made clear that it is not the statute itself but written communications based on it that provide notice to claimants. In *Garzon v. Board of Review, Dept. of Labor*, 370 N.J. Super. 1, 6, 7, 9, 10 (A.D. 2004), a case involving notice of a "good cause" exception to time requirements, the court held that the purpose of the notice statute is to "implement and execute due process protections mandated by the United States and New Jersey constitutions."

The court held that "notice must be contemporaneous with any denial" and "obvious and clear, otherwise the exception could be administratively buried in a fashion that would undercut the due process underpinnings of *Rivera*." It stated, "the citizen facing a loss at the hands of the State must be given a real chance to present his side ... before a government decision becomes final," and concluded that the risk of erroneous deprivation was high and the probable value of added procedural protections great.

And in *Rivera v. Board of Review*, 127 N.J. 578, 586, 590-91 (1992), where a migrant worker did not receive timely notice of a demand for repayment of unemployment benefits and was denied an appeal on the merits, the New Jersey Supreme Court reversed, ordering the NJDOL to promulgate regulations to assure that migrant workers received

"adequate notice" of agency determinations.

Finally, it does not even seem possible for statutes and codes to provide notice or opportunity to be heard. In *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976), this Court held that Due Process "is a flexible concept and calls for such procedural protections as the particular situation demands. It is an opportunity that must be granted at a meaningful time and in a meaningful manner." If laws provided Due Process, they would not only have to contain names of applicants, dates, times and places for hundreds of hearings by multiple agencies all around the State but also continuously be updated.

The trial court for the first time shifts the burden to claimants to provide notice for themselves to remedy notice failures, depriving them of their Constitutional right while relieving parties who owe process of their Due Process obligations.

This view has no support in law. Due Process has never imposed any burdens on the individuals it protects. The court's reading so far distorts the nature and meaning of the Clause as to rewrite the Constitution. It is equivalent to deciding, i.e., that the Fourth Amendment of the Constitution allows unreasonable searches and seizures.

II. THE PROCEDURAL SAFEGUARDS ARE INADEQUATE UNDER DUE PROCESS BECAUSE THE NOTICE PROVISION IS OBSCURE AND THE NJDOL, CONTRARY TO ITS JURISDICTION OVER REVIEW, MISINFORMS CLAIMANTS THAT THERE IS NO RIGHT TO APPEAL, CAUSING LOSS OF BENEFITS

The existing procedural safeguards are effective only if notice is provided, however, where there is a notice failure, they are completely inadequate to prevent erroneous losses of benefits. As currently structured, the statute and code leave applicants who do not receive notice completely without a remedy, contrary to notions of fundamental fairness.

The statute N.J.S.A. 43:21-50, titled Review, at p. 2, providing that claimants under private plans have one year to file an appeal, makes no mention the notice requirement, and only cites code, library and research references for the State plan.

The provision for notice of appeal rights N.J.A.C. 12:18-2.2 (f) is not prominently displayed and is also mistitled. It is obscurely buried toward the end of a section inappropriately titled "Benefits" where no one would look for or expect to find a notice provision. That section describes payments to applicants and would lead anyone looking for appeal rights to either skip it altogether or stop reading.

For reasons that are not explained, the notice provision is separate from the main provision on appeal procedures in N.J.A.C. 12:18-2.6. For that

reason, parties who provide notice may not be aware of the notice requirement. The section on "Appeals" may mislead them to believe that it is the only all-inclusive provision, which may be why some claimants do not receive notice, a situation that could easily be remedied by combining the two provisions.

Even more serious is the fact that despite its jurisdiction over appeals under private plans, pursuant to N.J.S.A. 43:21-50 (a), N.J.A.C. 12:18-2.2 (f) and N.J.A.C. 12:18-2.6, the NJDOL turns these applicants away, misinforming them that there is no right to appeal under private plans and causing deprivation of benefits. Claimants should be able to go to the NJDOL for appeal procedures.

This situation has not been remedied because after filing the Notice of Claim in July 2006, Petitioner placed a blind call to the NJDOL, asking what to do about an employer's denial of disability and was again told essentially the same thing: "You can't do anything about it if they don't pay into the state plan," If the situation is not remedied, the NJDOL will continue to turn away claimants. It could easily be remedied by informing employees who process claims that there is an appeals process and providing them with written appeal procedures.

Given the right to appeal and its jurisdiction, the NJDOL should not inform claimants that their files will be closed on notice of the employer's decision. This also misleads claimants that there is no appeal, which when taken with the review statute, subjects them to two conflicting rules.

CONCLUSION

This case presents serious Due Process implications for applicants who do not receive notice of appeal rights and are left without a remedy. Because the procedural safeguards are inadequate to guarantee notice and opportunity to be heard, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted

Respectfully submitted,

MARGARET KLEINMAN
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Hackensack, N.J. 07601
(201) 342-7738

APPENDIX

ORDER OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
C-4 September Term 2009 - 065912

MARGARET KLEINMAN,

PLAINTIFF-PETITIONER
V.

NEW JERSEY DEPARTMENT OF LABOR,

DEFENDANT- RESPONDENT

FILED
Sep 10, 2010
Mark Neary
CLERK

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-005972-07 having been submitted to this Court, and the Court having considered the same;
It is ORDERED that the petition for certification is denied; and it is further
ORDERED that the appeal filed in the within matter is dismissed.
WITNESS, the Honorable Stuart Rabner. Chief Justice, at Trenton, this 8th Day of September, 2010.
The foregoing is a true copy of the original on file in my office

Ss: Mark Neary
CLERK OF THE
SUPREME COURT

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5972-07T1

MARGARET KLEINMAN,

Plaintiff-Appellant,

v.

DEPARTMENT OF LABOR, DIVISION OF UNEMPLOYMENT AND DISABILITY INSURANCE,

Defendant-Respondent.

A-5972-07T1
Submitted March 8, 2010 - Decided March 29, 2010
Before Judges Yannotti and Chambers.
On appeal from the Superior Court of New

Jersey, Law Division, Bergen County, Docket No. L-992-08.

Margaret Kleinman, appellant pro se.
Paula T. Dow, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Karen M. Campbell, Deputy Attorney General, on the brief).

PER CURIAM

Plaintiff Margaret Kleinman appeals from the order of May 9, 2008, dismissing her complaint with prejudice and the order of July 3, 2008, denying her motion for reconsideration. In her complaint filed on February 5, 2008, plaintiff contends that nineteen

years earlier, on February 10, 1989, her employer improperly denied her application for temporary disability benefits from its private temporary benefits plan. When she contacted the defendant Division of Disability and Unemployment Insurance in the Department of Labor (the Division) at that time to determine what could be done, she contends that she was told that nothing further could be done because a private plan rather than a state plan was involved. She maintains that she was not advised of her right to appeal and the procedures involved to do so. She contends that the denial of the temporary disability benefits caused her financial "ruin" and led to "a lifetime of financial hardship, worry and insecurity." Her claim for damages includes claims for compensatory damages for financial losses and pain and suffering and punitive damages for infliction of emotional distress. Plaintiff is now an attorney and acknowledged to the trial court that she became an attorney in 1996, twelve years before this action was instituted.

On May 9, 2008, the trial court granted the Division's motion to dismiss the complaint on the basis that plaintiff had failed to exhaust her administrative remedies and that the claims were barred by the statute of limitations in the Tort Claims Act, 59:8-8. In her motion for reconsideration, plaintiff disputed the trial court's previous rulings and also raised due process issues regarding the Division's failure to advise her of her rights in 1989. The trial court found these arguments to be without merit and denied the motion for reconsideration.

On appeal, plaintiff contends that the trial court erred in failing to find a due process violation in the Division's action, in holding that she should have exhausted administrative remedies, in failing to find that under the discovery rule her claim was timely, in finding her complaint untimely when the Division had not pleaded the defense of laches, and in holding that she did not state a claim, maintaining that her suit sounded in negligence not misrepresentation.

After a careful review of the record, we find that these arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We affirm substantially for the reasons set forth by the trial judge.

Affirmed.

Prepared by the Court

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – BERGEN COUNTY

DOCKET NO.:. BER-L-992-08

MARGARET KLEINMAN,

(Plaintiff)

RECEIVED

ORDER

JUL 03 2008

vs

DEPARTMENT OF LABOR
DIVISION OF UNEMPLOYMENT
AND DISABILITY INSURANCE,

(Defendant)

THIS MATTER having come before The Honorable Brian R. Martinortti, J.S.C., upon Plaintiff's motion for reconsideration of this Court's Order of May 9, 2008, which dismissed Plaintiff's Complaint against the Defendant with prejudice and the Court having read the motion papers and having hear the argument of counsel; for the reasons set forth on the record

IT IS ON THIS 3 DAY OF July, 2008
ORDERED, as follows:

1. Plaintiff's Notice of Motion for Reconsideration is denied.

Ss: Brian R. Martinotti
BRIAN R. MARTINOTTI. J.S.C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – CIVIL PART
BERGEN COUNTY
DOCKET NO. L-992-08

MARGARET KLEINMAN,
PLAINTIFF

TRANSCRIPT
OF MOTION

vs

NEW JERSEY DEPARTMENT OF LABOR,
DIVISION OF UNEMPLOYMENT AND
DISABILITY INSURANCE,

DEFENDANT

Place: Bergen County
Courthouse
10 Main St.
Hackensack, NJ 07601

Date: July 3, 2008

The court: I will just for the record incorporate my reasons that were set forth on the record on May 9, 2008 in an oral opinion., I have previously set forth the facts in this matter I indicated the standard that needs to be applied for reconsideration. Plaintiff's argument that due process was not properly provided to her is her first argument. She argues the Division did not inform her of her rights and in failing to inform her of her rights as well as the procedures involved she was unlawfully deprived of due process.

Defendant argues due process was never a claim independently asserted in the plaintiff's

complaint and plaintiff's attempt to now assert a cause of action based on a new theory is inappropriate. Furthermore, defendant asserts even if the Court were inclined to consider plaintiff's due process is without merit and that failing to advise plaintiff about an appeal process is not a due process violation. Defendant knows that a due process violation would involve and affirmative failure to provide the plaintiff with the appeal process which is not the case here. Due process is not a fixed concept, but a flexible one that depends upon the particular circumstances. *John Doe versus Poritz*, 142 New Jersey 1, 106, citing *Zinderman versus Burch*, 494 U.S. 113 1990.

Fundamentally, due process requires and opportunity to be heard at a meaningful time in a meaningful manner., That's at *Poritz 106 citing Tacon* at 1218. The minimum requirements of due process are notice and the opportunity to be heard. That's *Kohn* citing to – I'm sorry, that's *Poritz* citing to *Raffoul*, 826 F.2d 218 page 222, Third Circuit. *Fantony versus Fantony*, 36 Super 375 Chancery Division (1995) modified on other grounds at 21 New Jersey 525, (1956) holding that in this state the minimum requirements of due process at law include reasonable notice of the nature of proceeding and fair opportunity to be heard therein.

In this matter plaintiff is not challenging the procedures the state had in place which would have provided due process had the plaintiff chosen to make use of them. Rather, plaintiff's argument she was not advised of these procedures. This argument is without merit. Plaintiff's ignorance of these procedures and ultimate failure to initiate

the appeals process cannot constitute a due process violation where the State provided her with an opportunity to be heard. That's *Poritz* at page 106.

The Court also notes plaintiff's argument that this Court's decision is arbitrary citing to *U.S. versus Scurry*, 102 N.J. 492 (2008) but for the reasons se forth this Court's prior opinion, and in this opinion plaintiffs argument falls short of meeting that standard.

The next claim is that the defendant's argument is that the plaintiff raised a misrepresentation claim is incorrect. Plaintiff's motion does state misrepresentation is intentional involving the intent to deceive not negligence as alleged here which is actual under the Tort Claims Act. However, the Act explicitly immunizes public employees from liability for misrepresentation.

That's title 59:3-10 states that a public employee acting within the scope of his employment is not liable for injury caused by misrepresentation

Therefore, that claim is barred by the Tort Claims Act.

Finally, plaintiff argues that the ruling that accrual occurred at the time of denial in 1989 was incorrect and that it overlooks plaintiff was unaware at that time of the Division's duty and failure to provide notice. Plaintiff's argument in this motion brings virtually no new information to the Court which was not raised in the previous motion. As the Court previously noted, ordinarily a cause of action when any wrongful act or omission resulting in any injury for which the law provides a remedy occurs. *Beachamps versus New*

Jersey Transit Corp., 164 New Jersey 111,(2000). The date of the accident or alleged wrongful act is generally the date which the cause of action accrues. *Maherv versus County of Mercer* 384 Super. 182 Appellate Division 2006. *Fuller versus Rutgers*, 154 Super 420 Appellate Division 1997, however, an exception to the accrual concept is the discovery rule which is triggered where the victim is either unaware that he or she has been injured or although injury – strike that – does not know third party is responsible. That's *Beachamp* sat 117.

Plaintiff further argues that she was not aware that the Division had provided her with incorrect information in June of 2006, thus claims her action was timely. In this case the plaintiff learned in February 1989 that he application for disability benefits had been denied and the Division's alleged position was nothing could be done. That is her certification at page 1 which was filed with the original motion. It was at that time she became aware that she was injured and that the Division may be responsible. Therefore, plaintiff's claim accrued in 1989 and, thus, she was required to file her suit against the Division within two years thereof.

Here, even if the discovery ruled deemed to apply, it is reasonable to believe that at some point during nearly 20 years that plaintiff waited to file her claim she could have or should have realized an injury and its source.

To come to this realization is inexcusable. That's *Scurry* at 492. *Knorr versus Smeal* , 178 New Jersey 169 (2003). Previously the Court noted plaintiff's reliance on "equitable tolling and good cause as discussed in *Mazzarella versus*

Board of Review, 172 super 459 Appellate Division 1980. *Garzon versus Board of Review,* 270 Super., 1 Appellate Division 2004 to be misplaced.

New Jersey's Department of Labor's motion to dismiss involves an evaluation of the Statute of Limitations under the Tort Claims Act. In both *Mazzarella* and *Garzon* plaintiff was appealing under different statutory provisions which are unrelated to the Statute of Limitations issues before this Court or the Tort Claims Act. Even assuming equitable tolling would apply plaintiff has provided no acceptable explanation as to why equitable tolling should apply in this case especially given her lengthy delay before filing the lawsuit and failure to exhaust her administrative remedies.

For those reasons plaintiff's complaint – strike that – plaintiff's claims are barred as a matter of law. Reconsideration of the dismissal is hereby denied.

FILED

MAY 09 2008
BRIAN R. MARTINOTTI. J.S.C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – BERGEN COUNTY
DOCKET NO. BER-L-992-08

MARGARET KLEINMAN,

Plaintiff

ORDER
GRANTING
MOTION TO
DISMISS
COMPLAINT
IN LIEU OF ANSWER

v

NEW JERSEY DEPARTMENT OF LABOR,
DIVISION OF DISABILITY AND
UNEMPLOYMENT INSURANCE,

Defendant

THIS MATTER having come before the Court on application of Defendant New Jersey Department of Labor and Workforce Development, Division of Temporary Disability Insurance, for an order dismissing Plaintiff's Complaint against it for failure to state a claim upon which can be [relief] can be granted pursuant to R. 4:6-2(e), and the Court having read the submissions of the parties, considered argument of counsel and for good cause shown,

For the reasons set forth in the record, IT IS on this 9 day of May, 2008 hereby ORDERED that the Defendant's Motion to Dismiss Plaintiff's Complaint is GRANTED:

IT IS FURTHER ORDERED that Plaintiff's Complaint against Defendant is dismissed with prejudice; and

IT IS FURTHER ORDERED that counsel for the moving party shall serve a copy of this order on all other counsel of record within seven (7) days.

Ss: Brian R. Martinotti
BRIAN R. MARTINOTTI. J.S.C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – BERGEN COUNTY
DOCKET NO.:. BER-L-992-08

MARGARET KLEINMAN, PLAINTIFF — TRANSCRIPT OF MOTION

vs

NEW JERSEY DEPARTMENT OF LABOR, DIVISION OF UNEMPLOYMENT AND DISABILITY INSURANCE,

DEFENDANT

Place: Bergen County
Courthouse
10 Main St.
Hackensack, NJ 07601
Date: July 3, 2008

Before this Court is the New Jersey Department of Labor NJDOL's motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 4:6-2(e). Plaintiff opposes this motion.

This action arises out of plaintiff's allegations that the NJDOL negligently processed her application for temporary disability benefits or provided her with misinformation concerning any rights that she had upon termination vis-a-vis her private insurance company.

The Court will note that plaintiff did obtain a law degree in 1996.

The Court will incorporate the recitation of the overview previously set forth specifically concerning the date that the complaint was filed as well as the information contained in the Case Information Statement filed with the complaint.

At the outset, this Court must note the length of time that has expired since this case.. Plaintiff's application for benefits was denied in 1989. Plaintiff states in various forms and affirmations and certifications that she continued to contact the Division between 1993 and 2005 to no avail.

As indicated, she did obtain a law degree in 1996 and indicates that she was at an ICLE seminar and spoke to the presenter subsequent thereafter.

In 2006 plaintiff argues that a notice of claim was filed pursuant to the Tort Claims Act, New Jersey State 59:1-1 et. Seq. This action was filed on February 5, 2008. The defendant moves to dismiss on failure to exhaust administrative remedies and on the grounds of the Statute of Limitations.

In a motion to dismiss the Court will search the complaint in depth with liberality to ascertain whether or not a "fundamental cause of action may

be gleaned even from obscure statements in the complaint.." *Lieberman vs Port Authority of New York and New Jersey*, 132 New Jersey 76, (1993) citing to *Printing Mart-Morristown versus Sharp Electric*, 116 New Jersey 739, 746 (1989).

On the other hand, dismissal is mandated where the factual allegations are properly insufficient to support a claim upon which relief can be granted. *Rider versus State Department of Transportation*, 222 New Jersey Super. 547, 552, that's an Appellate Division decision in 1987. A Court can only consider the facts on the face of the complaint when deciding whether or not plaintiff has met its burden. *Printing Martc*, 116 New Jersey at 746.

In addition, in doing so the Court must accept true all facts alleged in the complaint. *Union Ink Company versus AT&T*, 352 New Jersey Super.. 617, Appellate Division 2002.

If an adequate administrative remedy is available to a party, a party ordinarily must exhaust that remedy before seeking leave from the courts. *Campione versus Adamar of New Jersee Inc.*, 155 New Jersey 245, 261 (1998). Supreme Court held exhaustion of administrative remedies before resort to the Courts is firmly impeded [embedded] in juridical principle. This principle requires exhausting available procedures, that is, pursuing them to their appropriate conclusion and – correct – and awaiting their final outcome before seeking judicial intervention. *Garrow versus Elizabeth General Hospital,* 79 New Jersey 547, 558 to 559, (1979) quoting *Aircraft and Diesel Equipment Corp. versus Hirsch,* 331 U.S. 752 (1947).

Under the New Jersey Temporary Disability Law, NJSA 43:21-25, and regulations

promulgated thereunder by New Jersey Administrative Code 12:18-1.1, plaintiff had an administrative remedy available to her to appeal the denial of benefits she claims in this complaint. Citing to New Jersey Administrative Code 12:18-26 which outlines the process to appeal denials of temporary disability under private plans.

Therefore, given the existence of these procedures, plaintiff must exhaust these remedies before filing a lawsuit and the matter must be dismissed.

Moreover, this matter must likewise be dismissed for plaintiff's failure to meet the requisite Statute of Limitations prescribed in the Tort Claims Act. 59:8-8. Under the Tort Claims Act, a plaintiff must submit notice within 90 days of accrual of their claim and thereafter file suit within two years of accrual. *Velez vs. Jersey City,* 180 New Jersey 284, (2004).

In this matter, it is clear that the date of accrual has long since passed. Plaintiff's application was first denied in 1989 almost two decades ago. Even assuming the actual date of denial is some time later, it is evident it is well before the Statute of Limitations had run. However, an exception to the accrual concept outlined above exists in the discovery rule. *Beachamps versus New Jersey Transit,* 164 New Jersey 111, (2000). The discovery rule is triggered where the victim is either unaware that he has been injured or although aware of injury does not know a third party is responsible.

In this matter the first time the plaintiff learned of her denial was in February of 1989 when the Division told her nothing could be done. That's admitted in plaintiff's certification. Therefore, the discovery rule is not of assistance

to the plaintiff in this case.

Furthermore, the Court finds plaintiff's reliance on "equitable tolling" and "good cause" discussed in *Mazzarella versus Board of Review*, 172 New Jersey Super., 1, Appellate Division 1980 and *Garzon versus Board of Review,* 370 N.J. Super. 1, Appellate Division 2004 to be misplaced.

Defendant's motion involves an evaluation of the Statute of Limitations under the Tort Claims act. Both *Mazzarella* and *Garzon* plaintiff is appealing under different statutory provisions which are unrelated to the Statute of Limitations issue before the Court under the Tort Claims Act. Even assuming that the tolling period could apply, plaintiff has provided no acceptable explanation of why equitable tolling should apply in this context especially given her length delay before filing this lawsuit, failure to exhaust her administrative remedy and candidness and candid before this Court indicating all the individuals that she has spoken to from the time of the denial up to the time that the tort claims notice was ultimately filed.

Accordingly, for those reasons the application will be granted and the complaint will be dismissed.